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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 979

ERTEL MANUFACTURING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Ertel Manufacturing Corporation, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, granting enforcement of an order of the National Labor Relations Board on the ground that the findings of the Board were supported by "substantial evidence" on the record considered as a whole.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit printed on October 19, 1965 is reported in 352 F. 2d 965 (CCA-7 1965); 60 LRRM 2280; 52 LC P. 16,687 and appears at Appendix A, pages 15 to 22 attached to this petition for a writ. A Petition for rehearing was denied on November 30, 1965. The decree of the Court of Appeals for the Seventh Circuit was entered on December 16, 1965. The Decision and Order of the National Labor Relations Board appears in the Record. (R. 2-60.)

JURISDICTION.

The jurisdiction of the Court is invoked under Section 1254(1) of the Judicial Code.

QUESTION PRESENTED.

Whether the Court below was correct in finding that Petitioner violated Section 8(a)(1) of the Labor-Management Relations Act and Section 8(a)(3) of the Labor-Management Relations Act, where the National Labor Relations Board applies different standards of proof to these provisions of the Labor-Management Relations Act, yet Section 10 of the Labor-Management Relations Act requires the application of a single evidentiary standard to questions involving judicial review of findings of violations of the Labor-Management Relations Act by the National Labor Relations Board.

STATUTE INVOLVED.

Section 8(a)(1) and (3) of the Labor-Management Relations Act, 29 U. S. C. 158(a)(1) and (3), 61 Stat. 140 provides as follows:

> Sec. 8(a) It shall be a unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 10(e) of the Labor-Management Relations Act, 29 U. S. C. 160(e), 61 Stat. 146, provides as follows:

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts

of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its

judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

STATEMENT.

Petitioner operates a plant and place of business at Indianapolis, Indiana where it is engaged in the business of manufacturing, sale and distribution of automotive parts, mainly pistons. (R. 4.) During the times relevant (April and May of 1963) Petitioner employed approximately 355 people in all of its operations, although in the past the employment level has fluctuated between 220 and 355. (R. 282.) These employees worked in eleven departments under the supervision of a general superintendent, Carl B. Enochs. (R. 273.) General Foreman Harold Carr is in charge of production and in relation to that, shipping and receiving. (R. 288-90.) At the relevant times Petitioner operated two departments at night, the automatic and aluminum piston departments. (R. 291.) A labor union began an organizational campaign among Petitioner's employees during the latter part of April 1963, which began with meetings with the employees and then active organizational activities at Petitioner's plant. (R. 66-67.) These activities took the form of distribution and wearing of union buttons, pencils, combs, pamphlets and shirt pocket protectors, as well as in some instances wearing bumper stickers on the backs of shirts worn by employees of Petitioner. (R. 69; R. 70-71; R. 81; R. 93; R. 214.) At one time some one hundred and fifty of Petitioner's employees wore some form of union insignia at work and the effect of this on Petitioner's operations amounted to a general decline in the "required attention to work." (R. 285.)

The Court below affirmed the findings of the National Labor Relations Board on its petition for enforcement of its decision and order which required Petitioner to post a notice to the effect it would cease and desist from certain conduct found to be violative of Section 8(a)(1) of the Labor Management Relations Act and reinstate and pay backpay to employees specifically named in the Board's order because of discriminatory changes in the employment status of these employes in violation of Section 8(a)(3) of the Labor Management Relations Act. (R. 2-60; Appendix A, pages 15 to 22.) All of this unlawful conduct was found to have occurred during the union organizational attempt referred to above. More specifically, the Court below found the Board was correct in finding Petitioner violated Section 8(a)(1) of the Labor-Management Relations Act by (1) enforcing an invalid no-distribution rule; (2) attempting to prevent solicitation for the labor union during non-work time; (3) threatening employees with loss of economic benefits, discharge and plant closure if the labor union were to be chosen as their collective bargaining representative and (4) threats of discrimination and plant closure were labor union activities to continue and especially wearing union buttons while at work. This conduct was directly related to seven of Petitioner's employees. In addition, the Court below found the Board correct in finding Petitioner violated Section 8(a)(3) of the Labor-Management Relations Act by laying off a group of six employees on May 15, 1963, another group of twenty-one employees on May 29 and 31, 1963 and by laying off, suspending and demoting three employees at other times. (R. 2-60; Appendix A, page 16.)

REASON FOR GRANTING THE WRIT.

An Important Federal Question Is Presented by the Proceedings Below as to the Conflict Between the Evidentiary Standards Applied by the National Labor Relations Board in Finding Violations of Section 8(a)(1) of the Labor-Management Relations Act and Section 8(a)(3) of the Labor-Management Relations Act as These Standards Affect the Scope of Judicial Review in the Federal Circuit Courts of Appeals Under Section 10 of the Labor-Management Relations Act.

It is Petitioner's position that its petition for a writ should be granted because of the importance of the federal question arising from the conflict of standards used by the National Labor Relations Board as to the evidence required to establish violations of the Labor-Management Relations Act and the standard of review established by Congress in Section 10 of the Labor-Management Relations Act. The results of this conflict are apparent in this case since the Court below found as follows: (1) "We hold substantial evidence on the whole record supports the Board's finding that" Petitioner violated "Section 8(a)(1)" of the Act; (2) "We hold also that substantial evidence on the whole supports the Board's finding that" Petitioner violated "Section 8(a)(3) of the Act" by making two layoffs and by laying off, demoting and discharging individual employees for union activities. (Appendix A, page 19.) Thus, the Court below applied a single standard to the findings of the Board that Petitioner violated these provisions of the statute, yet the Board based these findings not on this single standard as set forth in Section 10 of the Labor-Management Relations

Act, 29 U. S. C. 160(e), 61 Stat. 146 ("substantial evidence on the record considered as a whole") but on the Board's assumption that the Section 8(a) (1) violations could be established by one standard and the Section 8(a) (3) violations could be established by another standard. Although these assumptions are not express in this case, they are clearly implied by the Board in its Decision and Order. (R. 2-60.)

Rather recently this Court made the observation: "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." *N. L. R. B.* v. *Walton Manufacturing Company,* 369 U. S. 404, 407. It is Petitioner's position that in finding Petitioner in violation of the Labor-Management Relations Act in the respects enumerated above the National Labor Relations Board did exactly this by assuming in its Decision and Order issued herein that its long-established practice of applying differing standards was an acceptable practice even in light of this Court's holding in the *Walton Manufacturing* case. Thus, the Board has often stated the standard of proof required in cases involving discriminatory changes in employee status under Section 8(a) (3) of the Act as proof by "a preponderance of the evidence." *Glen Raven Silk Mills, Inc.,* 101 NLRB 239, 240 (1952); *Paul M. O'Neill Int'l Detective Agency, Inc.,* 124 NLRB 167, 172 (1959); *Falstaff Brewing Corporation,* 128 NLRB 294, fn. 2, 295 (1960), while the standard of proof in cases involving interference, restraint or coercion under Section 8(a) (1) of the Act is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co., Inc.,* 124 NLRB 146, 147 (1959); *Susquehanna Broadcasting Co., Etc.,* 139 NLRB 1294,

1295 (1962); *Indiana Metal Products Corporation,* 100 NLRB 1040, 1041-43 (1952.)

The effect of these obviously differing standards must be viewed in light of the specific evidentiary requirements for proof of a discriminatory change in employee status. Thus, the preponderance of the evidence means the record must show the change in employee status actually took place, the employee took part in union activities, the employer knew of this activity and the change in status took place because of this activity. However, once the employer has shown a reasonable cause for these changes, the record must show, to establish an unlawful change in status, that the cause shown by the employer is not the true cause. *Sahm, "The Discharge for Union Activities,"* 1961 Labor L. J. 324, 327-28 and cases cited. These tests indicate that the motive behind the change in employee status must be discriminatory, i. e., for anti-union reasons. The existence, however, of anti-union motive can be shown not by a "preponderance of the evidence", but rather by a test of whether an employer's conduct "reasonably tends" to interfere with the "free exercise" of employee rights under the statute. Thus, although Petitioner accepts the principle that in the usual case intent need not be proved specifically, *Radio Officer's Union* v. *N. L. R. B.,* 347 U. S. 17, 45 it does not accept the proposition that the motive or intent required can be proven by an evidentiary standard with no meaning—"a reasonable tendency to interfere," in all Section 8(a) (3) cases, *N. L. R. B.* v. *Brown,* 85 S. Ct. 980, 986, or that a different standard can be applied to conduct falling within the same section of the Act.

The Court below in following the Board's varying standards made error in finding conformity with the substantial evidence test, since the Board's findings were not based on this test, but rather on the varying standards set

forth above. Thus, the Decision and Order issued by the Board uses in all instances of 8(a)(3) violations the conclusions that the "motivation" was discriminatory, regardless of Petitioner's reasons for the change in employee status. (R. 25; R. 28; R. 34; R. 35; R. 36; R. 38; R. 43.) This was done on the basis of findings of motive based on a "reasonable tendency" test under Section 8(a)(1) and not under a "preponderance of the evidence" test under Section 8(a)(3). In other words, the Board did not use a single standard, but a dual standard and by using this standard it was able to "boot-strap" itself as to proof of Petitioner's violations of the statute. The use of this dual standard in this manner vitiates the following directive: "But where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adopted to achieve legitimate business ends or to deal with business exigencies we enter into an area where the improper motivation of the employer must be established by independent evidence." *N. L. R. B.* v. *Brown,* 85 S. Ct. 980, 986. The record shows that valid business reasons were clearly shown for two changes in employee status found to be the result of unlawful motive on the part of Petitioner, absent independent evidence of motive.

The Board found Petitioner discharged James E. Plymate because "the moving cause was the union activity of Plymate, and said discharge was discriminatorily motivated and a violation of Section 8(a)(3) and (1) of the Act." (R. 38.) The record shows that Plymate began work for Petitioner on December 13, 1962 and was discharged on May 17, 1963. (R. 267.) About a "week and a half or two weeks" before his discharge Plymate was interviewed by Petitioner concerning his involvement in a "burglary that had happened at the Ertel Manufacturing Warehouse." (R. 268-70.) Plymate's union activity involved wearing

union buttons and execution of a union card. Although at the time of his interview with Petitioner concerning the burglary he was not wearing any union insignia because "I left—I had one of those pocket protectors and I had the badges on it and I had left it in the shirt so I wasn't wearing them that day," Plymate was wearing such badges at the time of his discharge. (R. 267; R. 271.) Petitioner's Plant Superintendent testified this employee was "under suspicion of robbery. He took a man to our warehouse while he robbed the warehouse . . . and the police asked us to keep him for a while before we let him go because they might want him." (R. 282-83.) Even though Plymate was never formally charged with a crime, this testimony is uncontradicted in the record. The Board's order requiring Petitioner to take this man back to work and pay him for all sums lost as a result of his discharge can only be based on the assumption that because elsewhere in the record there is some evidence Respondent was unlawfully opposed to labor unions, this man's discharge arose from an anti-union motive. This other conduct found to have a reasonable or natural tendency to interfere with employee rights in general was enough to overcome Petitioner's concern over the continued employment of one under suspicion of burglary, even though the discharge under the Board's apparently applicable standards should be tested by a preponderance of the evidence.

Similarly, the Board found Petitioner's "layoffs of May 29 and 31 were discriminatorily motivated, that the reasons advanced by the Respondent are in fact pretexts, and that said layoffs were violative of Section 8(a)(3) and (1) of the Act." (R. 34.) The layoff involved twenty-one employees of Petitioner working on the night shift in its aluminum piston department. Two other employees were demoted as a result of the discontinuance of the shift. Although the layoff involved twenty-one employees, the Board

issued a complaint involving only sixteen of them as far as any unlawful conduct on the part of Petitioner was concerned. (R. 140-41.) As to five of the remaining sixteen employees found to have been subjected to discrimination, there is no evidence in the record at all, since they neither testified nor was anything of substance said about them by other witnesses called by the Board. (R. 135; R. 163; R. 183.) Therefore, as to the entire group there is evidence concerning only eleven. The record also shows that of the eleven employees laid off on these dates about whom there is any evidence at all, seven worked less than four months for Petitioner, two less than a year, one a little over a year, and one approximately four years. (R. 78; R. 83; R. 92; R. 114; R. 115; R. 172; R. 188; R. 202; R. 215; R. 231; R. 235; R. 238; R. 244; R. 256.) Six of the eleven were ultimately put back to work. (R. 53-4.) Once again the motive here rests on certain verbal conduct by Petitioner's supervisors involving seven employees found to be unlawful under Section 8(a)(1) of the Act. (R. 16-23.)

The layoff was made because prior to the advent of any union activity (R. 65; R. 273) among its employees Petitioner had made arrangements to purchase another firm producing large-sized pistons. The purchase was desirable from Petitioner's point of view since production of large-sized pistons would place it in a less competitive field. Part of the purchase agreement required Petitioner to assume the contracts for over-size pistons already let by the seller. Petitioner had originally planned to transfer supervisory personnel from the seller's plant to Indianapolis, but of the three supervisors involved in the transfer only one actually came to Indianapolis and he left Petitioner's employ. This left Petitioner with a shortage of competent supervisors, yet an obligation to produce over-size pistons. As a result, Petitioner either had to lose the business it hoped to ac-

quire as a result of the purchase or transfer the needed supervision and thereby cause dislocation in one of its piston departments. The decision was made by Petitioner to live up to its obligation and try to retain its new business, and this necessitated purchasing aluminum pistons elsewhere. (R. 273-77.) This, then, is what the Board found to be unlawful because of the generalized unlawful intent it infused into the layoff by inference from other conduct found to be unlawful under a lesser evidentiary standard.

Although the "substantial evidence" test had been criticized by some commentators, *Cooper, "The 'Substantial Evidence' Rule," 44 A. B. A. J.* 945 (1958), it is clear that this is the single test on review of cases arising under the unfair labor practice provisions of the Labor-Management Relations Act. *N. L. R. B.* v. *Brown,* 85 S. Ct. 980; *N. L. R. B.* v. *Walton Manufacturing Company,* 369 U. S. 404; *Note, "Administrative Law: Labor Law: Substantial Evidence Test,"* 48 Cornell L. Q. 309 (1963). It is apparent that the Board in this and other cases while giving apparent effect to this statutory test (R. 44), has conveniently constructed evidentiary requirements which in effect negate the thrust of this test by applying differing standards of proof to violations of the same section of the Act. By use of this device the Board has been able to vitiate the application of the substantial evidence rule as enunciated in *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474 and *N. L. R. B.* v. *Pittsburgh S. S. Co.,* 340 U. S. 498 by applying differing evidentiary standards where the law requires the application of a single standard.

CONCLUSION.

For these reasons Petitioner asks that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 15062 SEPTEMBER TERM AND SESSION 1965

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
ERTEL MANUFACTURING CORPORATION,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

October 19, 1965.

Before HASTINGS, *Chief Judge*, DUFFY and CASTLE, *Circuit Judges.*

DUFFY, *Circuit Judge.* The Labor Board petitions for enforcement of its order issued against respondent and dated June 5, 1964.[1] Respondent (Company) maintains a factory and place of business in Indianapolis, Indiana, where it is engaged in the business of manufacturing and selling automotive parts.

The Union involved is the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, hereafter called the Union.

1. The Labor Board's decision and order are reported at 147 N.L.R.B. No. 39.

The Labor Board adopted the Trial Examiner's findings and decision holding the Company had violated Section 8(a)(1) of the Act by 1) enforcing an invalid no-distribution rule; 2) attempting to prevent solicitation upon behalf of the Union during non-work time; 3) threatening employees with the loss of benefits, discharge and plant closure if the Union were to obtain representation rights, and 4) threats of discrimination and plant closure if the wearing of Union buttons and other Union activities continued. The Board also found the Company had violated Section 8(a)(3)(1) of the Act by laying off a group of six employees on May 15, 1963, a group of twenty-one employees on May 29 and May 31, 1963, and by laying off, suspending and demoting individual employees on various other dates.

The Company had approximately 350 employees. They worked in eleven departments under the supervision of general superintendent Enochs. General foreman Carr was in charge of seven of these departments containing approximately 210 employees. The Company operated a day and night shift in the production and aluminum piston departments. In the latter department, twenty-one of the forty-seven employees were on the night shift.

When the Company hired a new employee, he was introduced to one of three men—Zigler, Longworth or Aurs. These men gave work assignments each day to the employees working on their shift. Each of the three also issued reprimands.

On the basis of these facts, the Board found, in accord with the Trial Examiner, that Zigler, Longworth and Aurs were supervisory employees as defined by Section 2 (11) of the Act. Whether an individual is a "supervisor" within the meaning of Section 2 (11) is a question of fact and, as such, will not be overturned on review if supported by substantial evidence. *Journeymen Plasterers' Protective*

Society, etc. v. *N. L. R. B.*, 7 Cir. 341 F. 2d 539. We feel the record contains substantial evidence to support the Board's finding on this question.

The officers of the Company were aware of the Union's organizing campaign. On April 30, 1963, the Union conducted an organizing meeting of the day shift employees and two days later, of the night shift men. At each meeting, employees signed authorization cards and were given a pin containing a legend "Join U A W Vote." Those who agreed to become members of the organizing committee were given a slightly larger pin containing the same legend with the additional words "Organizing committee." At these meetings and subsequent meetings held each week, authorization cards were distributed to the employees to obtain additional signatures. The Union instructed that such solicitations should be made during lunch periods and other non-work time. About half of the employees openly wore the respective buttons during working hours.

The Company had in effect certain shop rules. Rule 22 stated: "Soliciting or collecting contributions for any purpose whatsoever on Company time, without the specific approval of Management" and Rule 23 "Distributing literature, written or printed matter of any description on Company premises, without the specific approval of Management." At the end of the rules appeared—"The commission of any of the above infractions will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending upon the seriousness of the offense in the judgment of the Management."

On May 3, 1963, superintendent Enochs called employee Sweet to his office and told him he was "subject to immediate dismissal" for passing out "illegal literature." Enochs read Rules 22 and 23 to him. Sweet replied the only thing he had ever distributed was union authorization cards.

Such activity had been limited to hours before work and during his lunch break. On May 16, the Company suspended Sweet for passing out "illegal literature" on its parking lot.

On May 15, 1963, Sweet and employee Cecil Russell were in the aluminum department about fifteen minutes before work time. Supervisor Zigler approached and told Russell "put those g-- d---- cards out of sight." Sweet advised Zigler that employees had the right to solicit for the Union on their own time. Zigler replied "It's not my rule. It's the Company's."

Employee Cloyd solicited authorization cards, mostly in the Company parking lot after he had finished work. He solicited occasionally on his own time in the factory. Superintendent Enochs asked Cloyd if he knew he was subject to immediate discharge and then read Rules 22 and 23 to him. Enochs told Cloyd if he were caught violating these rules, he would be dismissed.

After May 3, 1963, employee Greer wore his union button and his organizing committee button. Supervisor Aurs told him the Company would cut hours of work to offset any increase the Union might obtain. He asked Greer if he didn't enjoy his Christmas bonus and extra four hours a week. Aurs said "I see you're still wearing your badges. You must have plenty of money or don't want no job."

In the early part of May 1963, supervisor Longworth told employee Pemberton that if the Union got in, all employes would be able to fish all summer.

Employee Beck started to wear his union button about May 7. Supervisor Longworth told him if he continued to wear the button, he would probably be out of work before the month was up. He also said that if the Union got in, the Company would just close its doors.

On the morning of May 15, 1963, supervisor Zigler told

employees Sweet, Ramsey, Mobley, Holliday, Smith and Helton that they were all to go home and call back after 7 a.m. on May 17. It was plant superintendent Enochs who pointed out to Zigler which employees were to be sent home. All of these men except Ramsey were members of the union organizing committee. On their way out, they came through the section of the production department where employee Greer worked. Foreman Aurs, who had been heckling Greer about his union activities, told Greer —"there goes some more of your union buddies, going out, you see." The men reported back to work the following day.

The Company claims the men were sent home because the motor on one of the air compressors was not working properly. However, the Board found that the air compression on that date was approximately 95 to 100 pounds, whereas the normal operating pressure was between 80 and 100 pounds. Furthermore, employees Sweet, Smith and Mobley were working at the time on machines which did not require air pressure.

The Company discontinued the night shift in the aluminum piston department on May 29 at about 8:30 p.m. A total of twenty-one employees were laid off, partly from the night shift and partly from the day shift.

In addition, the Company demoted two setup men to operators. Among the twenty-one laid off, seventeen were members of the Union and thirteen were members of the organizing committee. The employees had not been warned about the pendency of the layoff. Zigler stated that "lack of work" was the reason.

On May 16, the Company sought quotations from another company for the production of alloy aluminum pistons. It requested bids in lots from 500 to 1000 on some items and up to 5,000 on others. The Company received

more than 10,000 pieces on June 3, an additional 17,333 pieces on June 20, and more than 15,000 pieces on July 10. The daily production of pistons manufactured by the Company on the day shift amounted to approximately 3,000 pieces.

The Labor Board concluded that the Company had violated Section 8 (a)(1) of the Act by the promulgation and implementation of its no distibution law, by extending its rule against solicitation on Company time to cover such activity on the employee's time, and by supervisors Aurs' and Longworth's threats of reprisals against supporters of the Union.

The Board further concluded that the Company violated Section 8 (a)(3) and (1) of the Act by 1) the layoff of six employees on May 15, 1963; 2) of twenty-one employees on May 29, and May 31, 1963; 3) the suspension of Sweet for one week and his demotion from setup man to operator on May 31; 4) the layoff of Beck from May 21 to May 27; 5) the discharge of Plymate on May 17, and 6) the demotion of Cloyd on June 24, 1963.

The Board's findings as to the reason for the layoffs and discharges are supported by substantial evidence in the record as a whole and we must accept them. *Universal Camera* v. *N. L. R. B.*, 340 U. S. 474; *N. L. R. B.* v. *Symons Mfg. Co.*, 7 Cir., 328 F. 2d 835, 837.

It is well established that an employer's rule which bars union solicitation by employees during non-working time or distribution of union literature during non-working time in non-working areas, in the absence of unusual circumstances, violates Section 8 (a)(1) of the Act. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793; *Time-O-Matic, Inc.* v. *N. L. R. B.*, 7 Cir., 264 F. 2d 96, 100. We hold there were no unusual circumstances in the instant case.

The Company argues that the fact that some of the

laid-off employees were subsequently reinstated, demonstrates that the layoffs were not motivated by the employees' union activities. However, the Board found the motive and purposes of the layoffs were "to scotch the lawful measures of the employees before they had progressed too far toward fruition." That is, before the Union obtained a majority in the plant. The fact is, the Union did not obtain a majority. Hence, the reinstatement of some of the layoffs at a later date does not disprove the illegal intent of the Company at the time of discharge.

The discharge of employee Plymate presents a close question. The Company's warehouse was burglarized by an ex-employee who had been discharged by the Company and who, earlier in the evening, had borrowed twenty-five cents from Plymate in order to purchase cigarettes. It was Plymate's testimony that the ex-employee told him that a man owed him $10 and, at his request, Plymate drove the ex-employee to a part of the city with which he was unfamiliar. In fact, he drove to a place near the warehouse, and a burglary was committed.

This story might seem improbable, but it is undisputed the Police Department closely questioned Plymate and he was not arrested nor detained in any manner. He was never charged with any crime with reference to the event. He explained the matter to superintendent Enochs and then went to work. However, ten days to two weeks later, he was discharged. We sustain the findings of the Board that Plymate was discharged because of his Union activities.

The Board ordered the Company to cease and desist from engaging in the unfair labor practices found to have been committed. The order requires the Company to offer reinstatement with back pay to ten piston department employees who were laid off, and also the same relief to

employee Plymate; further, to make whole the six employees who were laid off on May 16 for loss of pay suffered; to make whole eight employees for loss of pay suffered by other layoffs and demotions, and to post appropriate notices to this effect.

The Board dismissed the complaint insofar as it alleged violations of Section 8 (a)(1) of the Act by reason of certain actions of the Company's president and supervisors Longworth and Zigler. It also dismissed the complaint for alleged violations of Section 8 (a)(3) and (1) of the Act by the layoff of employee Lay and the discharge of employee Greer.

We hold substantial evidence on the whole record supports the Board's finding that the Company interfered with, restrained and coerced its employees in violation of Section 8 (a)(1).

We hold also that substantial evidence on the whole supports the Board's finding that the Company violated Section 8 (a)(3) of the Act by laying off two groups of employees for union membership and activity, and by laying off, demoting and discharging individual employees for the same reason.

As the Board's order is valid, a decree will be entered enforcing such order in full.

ORDER ENFORCED.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 979

ERTEL MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–22) is reported at 352 F. 2d 916. The Board's Decision and Order (J.A. 2–60)[1] are reported at 147 N.L.R.B. 312.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1965 (Pet. 15, 22). A petition for rehearing was denied on November 30, 1965, and a decree entered on December 16, 1965 (Pet. 2). The petition for a writ of certiorari was filed on February

[1] "J.A." refers to the Joint Appendix in the court below, which has been filed with the petition.

4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was substantial evidence on the whole record in support of the Board's finding that petitioner coerced and restrained its employees in the exercise of their organizational rights and discriminated against employees because of their union membership, in violation of Sections 8(a) (1) and (3) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at Pet. 2–5.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. INTERFERENCE, RESTRAINT AND COERCION

The Union [2] started an organizing campaign among the Company's [3] employees in April and May 1963. Union cards and union buttons were distributed and organizational meetings were held (J.A. 15–16; 65–70, 73–74). About half the employees wore the buttons openly during working hours; the Company knew their identity and was aware of the organizing campaign (J.A. 16; 77, 110, 167).

Since 1957, the Company has had shop rules prohibiting during both working time and the employees'

[2] International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO.

[3] The Company is engaged in the manufacture and sale of automotive parts, mainly pistons (J.A. 4).

own time distribution of written or printed matter or solicitation on Company property without the specific approval of management (J.A. 16–17; 287–288, 307). Employee Sweet obtained numerous authorization cards on behalf of the Union early in May 1963, before work time and during meal breaks (J.A. 17; 134–136). On May 3, Supervisor Enochs told Sweet that he was subject to immediate dismissal for passing out "illegal literature" (J.A. 17; 136–137).

Employee Cloyd also solicited authorization cards on Company property during non-working hours (J.A. 18; 183). On May 3, Superintendent Enochs likewise warned him that he was subject to immediate dismissal for violating the rules about distributing literature and soliciting on Company property without approval (J.A. 18; 184–186).

On May 15, Supervisor Zigler told employee Russell before work time to put his union cards out of sight. When Sweet advised Zigler that employees could solicit on their own time, Zigler replied that it was against a Company rule (J.A. 18; 143–145, 150, 174).

After May 3, employee Greer wore union and organizing buttons in the plant. Supervisor Aurs, on learning from Greer that he had signed a union card, stated that the Company would cut the hours of work and that this would offset any increase in wages the Union might obtain (J.A. 21; 263–264). Subsequently, Aurs asked Greer whether he liked the Christmas bonus and the extra hours of work in the plant, adding: "I see you're still wearing your badges. You must have plenty of money or don't want no job" (J.A. 21; 269).

Early in May, Supervisor Longworth told employee Pemberton that, if the Union got into the plant, the men would have time to go fishing all summer, and warned employee Beck that, if Beck continued to wear a union button, he would probably be out of a job before the end of the month (J.A. 21–22; 196–197, 206, 239). Longworth also stated to Beck that, if the Union "got in," the Company would just close its doors (J.A. 10, 22; 206, 239).

Employee Pemberton was absent from work on May 10; on his return, Plant Manager Hopper instructed him to obtain clearance from higher management. When Pemberton reported back, Hopper told him that he should be careful, that he was wearing a union button, and that "they" would be watching him (J.A. 22–23; 198–199, and see 303).

2. DISCRIMINATORY LAYOFFS OF GROUPS OF EMPLOYEES

On the morning of May 15, Supervisor Zigler sent home six employees working in the piston department, all but one of whom were members of the Union's organizing committee.[4] Zigler told them to call back early on May 17 (J.A. 23; 66–68, 247, 306). While Zigler stated that the employees were released because of low air pressure, the pressure was sufficient to operate the machines on which three of the laid-off men had been working (J.A. 23–24; 105–106, 145–146, 285–286), and the three other laid-off employees had been working on machines that did not require air pressure

[4] The employees were selected by Superintendent Enochs (J.A. 24; 104).

(J.A. 24–25; 105; 147–148). On prior occasions when the air pressure in the piston department had been too low for proper operation of the machines, the Company's practice had been not to lay off employees but to transfer them temporarily to another department (J.A. 24–25; 148). As the laid-off men walked through the production department on their way out of the plant, Supervisor Aurs told employee Greer, "there goes some more of your union buddies, going out * * *" (J.A. 26; 266).

On May 24, the Company discontinued the night shift in the aluminum piston department, and some night-shift men were transferred to the day shift (J.A. 24, 28; 63, 305). On May 24 and 31, a total of 21 employees were laid off—some from the night shift and some from the day shift—and two setup men were demoted to operators (J.A. 28; 276–277, 292–293). Seventeen of the laid-off employees were members of the Union, and 13 of these were members of its organizing committee. (See J.A. 28; 67–70, 79–80, 83, 94, 101–102, 134, 163, 203, 207, 216, 234, 238, 243–244, 306–307.) The employees were not forewarned about the layoff. Supervisor Zigler stated that "lack of work" was the reason for the action (J.A. 29, 45; 84–85, 109, 212, 219–220, 297–298, 308), though at the time the Company was negotiating with another manufacturer of pistons for the production of aluminum pistons for the Company in quantities greatly in excess of those previously obtained from that firm (J.A. 29–30, 43–45; 155, 248–253).

3. DISCRIMINATORY TREATMENT OF INDIVIDUAL UNION EMPLOYEES

On May 16, Sweet, who had previously been threatened with dismissal by Superintendent Enochs because of his union solicitation (J.A. 17, 136–137), was suspended for one week by General Foreman Carr, ostensibly because of "insubordination, vile language and passing out illegal literature" (J.A. 26–27; 150–153, 307–308). When Sweet asked Carr to specify the nature of the insubordination, both Carr and Personnel Director Hopper refused any explanation (J.A. 26–27; 151–154). On May 31, after returning to work, Sweet was demoted by Superintendent Enochs from setup man on the day shift to machine operator with a reduction in pay; this occurred at the same time that Supervisor Zigler informed the day-shift employees of their layoffs (J.A. 34; 118, 125–130, 165–166; see *supra,* p. 5). The Company claimed that the demotion was caused by lack of work; but this left only three setup men to do the work previously performed by four, even though the number of operators on the day shift had been reduced only slightly, from 22 to 21 (J.A. 28, 34–35; 275–277, 291–293).

Employee Beck was a member of the Union and its organizing committee and wore union buttons while at work (J.A. 35; 203–205, 206–207). His work consisted of packing pistons and preparing packing boxes (J.A. 35; 203). When he reported for work on May 21, Supervisor Zigler told him that he was laid off for lack of work (J.A. 35; 203–204, 212–213). However, on that day there were a greater number of pistons to be packed than on normal days (*ibid.*).

Employee Plymate signed a union authorization card, was a member of the organizing committee, and wore union buttons at work (J.A. 36; 267–268, 271). Early in May, Bowman, an ex-employee of the Company, told Plymate that someone owed him money, and at his request Plymate drove him to a part of the city unfamiliar to Plymate (J.A. 36–37; 269–271). In fact, Plymate drove to a place near the Company's warehouse, where a burglary was committed (*ibid.*). Plymate was closely questioned by the police, to whom he explained his presence at the location, and he was not arrested or detained in any manner (J.A. 37; 268, 271). He was never charged with any crime with reference to the event (*ibid.*). On the following morning, Plymate explained the matter to Superintendent Enochs and went to work (J.A. 37; 268, 270–271). About two weeks later he was discharged upon the instruction of Enochs, without receiving any explanation (J.A. 36; 267–268).

Employee Cloyd was promoted from machinist to setup man, with an increase in wages, in April 1962 (J.A. 42; 172–173). He became a member of the organizing committee, wore union buttons at work, and distributed union authorization cards (J.A. 42, 181–183). As stated (supra, p. 3), he was threatened with dismissal for distributing union cards on his own time; and on June 24, 1963, the Company demoted him from setup man to machinist, without giving him any explanation (J.A. 42; 173, 186–187).

B. THE BOARD'S CONCLUSIONS AND ORDER AND THE DECISION OF THE COURT OF APPEALS

The Board found that the Company had violated Section 8(a)(1) of the Act by promulgating and applying its no-distribution and no-solicitation rules to activity on the employees' own time, and by the threats of reprisal of Personnel Manager Hopper and Supervisors Aurs and Longworth (J.A. 16–23). The Board further found that the Company had discriminated against its employees in violation of Section 8(a)(3) by the layoff of 6 employees on May 15, 1963, the layoff of 21 employees on May 29 and 31, and the suspension and demotion of Sweet, the layoff of Beck, the discharge of Plymate, and the demotion of Cloyd (J.A. 43–46).

The Board's order (J.A. 56–58) required the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily discharged or laid off and not recalled, and to make whole the employees discriminatorily laid off and later recalled.

The court of appeals held that the Board's findings were supported by substantial evidence, and enforced the Board's order in its entirety (Pet. 15–22).

ARGUMENT

1. Petitioner's basic contention is that the Board improperly applies a different standard in determining whether there is a violation of Section 8(a)(1) of the National Labor Relations Act from that it applies under Section 8(a)(3). Under Section 8(a)(1), petitioner argues, the Board's standard of proof is

"whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act" whereas in cases involving discriminatory changes in employee status under Section 8(a)(3) (*e.g., American Freightways Co.,* 124 N.L.R.B. 146, 147), the Board requires proof by "the preponderance of the evidence." There is no substance to this contention, which confuses findings of evidentiary facts with the conclusions or inferences which the Board may properly draw from them. As to evidentiary facts, Section 10(c) of the Act requires that they must be established by "the preponderance of the testimony" adduced at the hearing before the Board or its Trial Examiner. After the evidentiary facts have thus been established, the Board—whether the question is violation of Section 8(a)(1) or violation of Section 8(a)(3)—"may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 800. See, also, *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 48–49; *National Labor Relations Board v. Erie Resistor Corp.,* 373 U.S. 221, 227–229, 236; *National Labor Relations Board* v. *Exchange Parts Co.,* 375 U.S. 405, 409.

This standard was fully satisfied here. The evidentiary facts respecting the Company's overly broad no-distribution and no-solicitation rules and the threats of its supervisors were established by a preponderance of the testimony adduced at the Board hearing.

The Board could then properly conclude, as it did, that such rules and conduct would tend to interfere with the exercise of employee organizational rights. For there is no doubt that an employer violates Section 8(a)(1) of the Act by barring the distribution of union literature and union solicitation by employees on their own time and the wearing of union insignia (*Republic Aviation Corp.* v. *National Labor Relations Board, supra*), or threatening that unionization will lead to loss of earnings or plant shut down. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 338; *International Assn. of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 76.

2. Petitioner further contends that the Board's findings of discriminatory motivation for the discharge of Plymate and for the mass layoffs on May 29 and 31 (Pet. 10–13) were not supported by substantial evidence. This question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491; *National Labor Relations Board* v. *Walton Manufacturing Co.,* 369 U.S. 404. In any event, the facts detailed in the Statement, *supra,* pp. 4–7, fully warranted the conclusion of the court below "that substantial evidence on the whole [record] supports the Board's finding that the Company violated Section 8(a)(3) of the Act by laying off two groups of employees for union membership and activity, and by laying off,

demoting and discharging individual employees for the same reason" (Pet. 22).[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1966.

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[5] Petitioner's reliance (Pet. 10, 13) on *National Labor Relations Board* v. *Brown*, 380 U.S. 278, is misplaced. In that case the employers' actions were found to have been motivated by legitimate business ends (*ibid.*, at 287–288) and there was no anti-union motivation, whereas here the Board and the court below found that the business reasons given by petitioner were pretexts and that petitioner was in fact actuated by a desire to discourage membership in the Union.

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